APPEALS BOARD
UTAH LABOR COMMISSION

REYNA F. TUCKER, **Petitioner,** **vs.** **7 ELEVEN STORE and ACE AMERICAN INSURANCE COMPANY,** **Respondents.**	**ORDER OF REMAND** **Case No. 05-0976**

7 Eleven Store and its insurance carrier Ace American Insurance Company (referred to jointly as "7 Eleven" hereafter), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Marlowe's award of benefits to Reyna F. Tucker under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Ms. Tucker claims workers' compensation benefits for a spinal injury allegedly caused by her work for 7 Eleven on September 25, 2003. Judge Marlowe referred the medical aspects of Ms. Tucker's claim to a medical panel and then, based on the panel's report, awarded benefits to Ms. Tucker. In challenging Judge Marlowe's decision, 7 Eleven argues that Ms. Tucker's work at 7 Eleven was neither the legal nor the medical cause of her spinal problems. 7 Eleven also argues that its evidence and objections to the medical panel report were not properly considered. Additionally, both parties agree that Judge Marlowe awarded temporary total disability compensation to Ms. Tucker for an incorrect period of time.

FINDINGS OF FACT

For purposes of this decision, the Appeals Board adopts the findings of fact set forth in Judge Marlowe's decision and summarizes the facts relevant to Ms. Tucker's claim as follows.

On September 25, 2003, while working for 7 Eleven, Ms. Tucker lifted a box of cola syrup and felt immediate pain in her low back. She sought medical attention that same day and was diagnosed with lumbar nerve impingement syndrome. She received conservative treatment over the next several months but continued to experience low-back pain. She also continued working for 7 Eleven on a light-duty assignment during this period of time.

Dr. Brown, one of Ms. Tucker's treating physicians, expressed the opinion that a medical causal connection existed between Ms. Tucker's low-back problems and her work accident at 7 Eleven. Dr. Knorpp, who evaluated Ms. Tucker's condition on behalf of 7 Eleven, found no medical causal connection between Ms. Tucker's work and her back problems. In order to resolve this dispute, Judge Marlowe referred Ms. Tucker's claim to an impartial medical panel. The panel agreed with Dr. Brown that a medical causal connection did exist between Ms. Tucker's work and her back problem.

Judge Marlowe accepted the medical panel's opinion and awarded workers' compensation benefits to Ms. Tucker. 7 Eleven then filed its motion for Appeals Board review.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A-2-401(1) of the Utah Workers' Compensation Act provides disability compensation and medical benefits to workers who have been injured by accident "arising out of and in the course of their employment." In *Allen v. Industrial Commission*, 729 P.2d at 26, the Utah Supreme Court held that an injury "arises out of" employment when the employment is both the "legal cause" and the "medical cause" of the injury. In this case, 7 Eleven argues that Ms. Tucker's work at 7 Eleven is neither the "legal cause" nor the "medical cause" of Ms. Tucker's current back problems.

Legal causation. As its first argument, 7 Eleven contends that Judge Marlowe's decision fails to properly apply the requirement of "legal causation" to Ms. Tucker's claim.

In *Price River Coal Co. v. Industrial Commission*, 731 P.2d 1079, 1082 (Utah 1986), the Utah Supreme Court described the test for legal causation as follows:

> Under Allen, a usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life." . . . . (Citations omitted.)

However, not every pre-existing condition will trigger application of the more stringent test for legal causation. As the Utah Court of Appeals stated in *Nyrehn v. Industrial Commission*, 800 P. 2d 300, 334 (Utah App. 1990):

> [The Commission] may not simply presume that the finding of a preexisting condition warrants application of the Allen test. An **employer must prove** medically that the claimant 'suffers from a preexisting condition which **contributes** to the injury**.'** (Citations omitted; emphasis added.)

Thus, an ordinary work exertion satisfies the requirement of legal causation unless the employer proves that the applicant had a preexisting condition that contributed to his or her alleged work injury. If the employer does not establish such a contributing preexisting condition, the applicant need only satisfy the less stringent test for legal causation by showing any usual or ordinary work-related exertion.

During the evidentiary hearing on Ms. Tucker's claim, 7 Eleven identified two issues as being in dispute: 1) whether Ms. Tucker's work was the medical cause of her injuries; and 2) what medical care was necessary to treat those injuries. 7 Eleven explicitly advised Judge Marlowe that there were no other issues for adjudication. 7 Eleven's conduct during the hearing was consistent with this representation—7 Eleven addressed only the issues of medical causation and medical treatment. Then, in its closing argument, 7 Eleven again confined itself to the issues of medical causation and medical treatment and did not suggest that Ms. Tucker's claim was subject to the more stringent *Allen* test for legal causation.

Turning to the various medical records and opinions that were placed into evidence as the parties' joint medical exhibit, some of those records indicate that Ms. Tucker had a degenerative spinal condition prior to her accident at 7 Eleven. However, these records and opinions do not establish that Ms. Tucker's preexisting condition "contributed" to the injury for which she now claims benefits.

In summary on this point, it is apparent from 7 Eleven's conduct at hearing and from the evidence actually presented that 7 Eleven did not raise the more stringent *Allen* test for legal causation as a defense to Ms. Tucker's claim. Furthermore, the Appeals Board finds that Ms. Tucker's claim is not subject to that test because 7 Eleven failed to prove that Ms. Tucker's preexisting condition contributed to her current back problems. Consequently, Ms. Tucker must only demonstrate an ordinary work exertion in order to satisfy the requirement of legal causation. She has done that.[1]

Medical causation. As already noted, in addition to satisfying the requirement of legal causation, Ms. Tucker is required to prove that her work is the medical cause of her injury. 7 Eleven argues that she has not met this requirement. Specifically, 7 Eleven contends that Judge Marlowe, in finding the existence of medical causation: 1) misread the opinion of Dr. Knorpp, 7 Eleven's medical consultant; 2) erred in rejecting 7 Eleven's objections to the medical panel report as "untimely"; and 3) misinterpreted the panel's report.

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[1] Even if Ms. Tucker's claim were subject to the more stringent test for legal causation, it is not clear that she would fail that test. She injured her back while lifting a box weighing approximately 40 to 50 pounds. Because 7 Eleven did not raise legal causation as a defense to Ms. Tucker's claim, it was not necessary for Ms. Tucker to further define the exact nature of her work exertion. If the more stringent prong of legal causation were to be applied to Ms. Tucker's claim, fairness would require that she be given an opportunity to present additional evidence on this point.

Regarding Dr. Knorpp's opinion, Judge Marlowe states in her decision that "Dr. Knorpp discussed the pros and cons of fusion surgery but never expresses an opinion as to whether [Ms. Tucker] should have it done." 7 Eleven contends that this is a mischaracterization of Dr. Knorpp's opinion. The Appeals Board agrees. While it is true that Dr. Knorpp's opinion identifies two alternative schools of thought on the efficacy of surgery in cases such as Ms. Tucker's, Dr. Knorpp did not himself believe that the surgery was necessary.

On the question of whether 7 Eleven filed its objections to the medical panel report on time, the record is confused.[2] However, giving 7 Eleven the benefit of the doubt as to the timeliness of its objections, those objections do not undermine the report's admissibility into evidence but, rather, go to the weight that should be afforded the report. The Appeals Board addresses that question as follows.

The central issue 7 Eleven has raised in this case is whether the evidence establishes a medical causal connection between Ms. Tucker's work for 7 Eleven and her back injuries. The Appeals Board notes that Ms. Tucker's treating physicians believe that her back injuries are causally connected to her work. On the other hand, 7 Eleven's consultant has expressed a contrary opinion. It is because of this conflict that Judge Marlowe appointed a panel of medical experts to provide an impartial third opinion.

The medical panel appointed by Judge Marlowe consisted of two physicians with expertise in medical specialties related to Ms. Tucker's back condition. These panelists had access to Ms. Tucker's entire medical history, diagnostic studies, and the opinions of other physicians who had treated or examined Ms. Tucker. The panelists also personally examined Ms. Tucker. With the benefit of all this information, the panel was asked to consider whether a medical causal connection exists between Ms. Tucker's work at 7 Eleven and her back problem. In response, the panel noted that Ms. Tucker's "advanced degenerative disc disease . . . clearly must have pre-dated" the accident at 7 Eleven. The panel also noted that Ms. Tucker "had only one episode of low back pain" in the three years prior to the accident at 7 Eleven. The panel then concluded that Ms. Tucker's current problems are caused by the accident at 7 Eleven.

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[2] Judge Marlowe referred the medical aspects of Ms. Tucker's claim to a panel of impartial medical experts to help resolve differences of opinion between Dr. Knorpp, on behalf of 7 Eleven, and Ms. Tucker's treating physicians. Judge Marlowe received the panel's report on March 21, 2007. She forwarded the report to the parties on March 23, 2007, and notified them that they had 15 days to file any objections. The Commission's file contains 7 Eleven's objections dated March 29, 2007, addressed to Judge Marlowe and indicating a copy was sent to Ms. Tucker's counsel. While the date on the face of the objection is within the 15-day time limit, the document was not actually received by the Commission until April 23, 2007, a date well beyond the filing deadline. Further confusing the issue is the fact that Ms. Tucker filed a response to 7 Eleven's objection on April 9, 2007, which indicates that Ms. Tucker had received 7 Eleven's objections within the 15-day filing period.

Unfortunately, the medical panel's response fails to explain its conclusion. Without at least some explanation, it is impossible for the Appeals Board to understand the basis for the panel's conclusions and evaluate the soundness of those conclusion against the other medical evidence and opinion in the record. The Appeals Board therefore concludes that additional explanation from the panel is necessary.

The Appeals Board will remand this matter to Judge Marlowe to obtain the panel's additional explanation and supplemental report. On receipt of that explanation and report, Judge Marlowe will issue a new decision that takes into account all the evidence before her. Also on remand, Judge Marlowe will review and correct the award of disability compensation.

ORDER

The Appeals Board remands this matter to Judge Marlowe for further proceedings consistent with this decision. It is so ordered.

Dated this 8th day of April, 2008.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch